

PSYCHIATRIC ASSESSMENT OF MENTAL CAPACITY

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ABSTRACT

Mental capacity is assessed based on the ability of a person to make a specific decision at the time the decision needs to be made. The assessment should be carried out when the person's capacity is in doubt and he has to make a particular decision. A person is unable to make a decision when he cannot do one or more of these things in relation to making a specific decision at the time it needs to be made: (1) understand the information; (2) retain the information; (3) weigh up the information; and (4) communicate the decision. All practicable steps must be taken to help the person make his own decision. If the person lacks mental capacity to make a particular decision, then the decision-maker must act in the best interests of the person.

Key words: Mental capacity, decisions, understand, retain, weigh up, communicate, best interests

SFP2022; 48(8):

INTRODUCTION

Capacity is the ability of a person to do something, which can include performing a task or making a decision. A person can have or lack capacity for specific tasks or decisions and there are profound implications for their autonomy if they lack mental capacity. Knowing the person's mental capacity for specific tasks or decisions is therefore of pivotal importance. To determine this, careful assessment needs to be undertaken.¹

LEGAL DEFINITION OF MENTAL CAPACITY

The Mental Capacity Act (MCA) 2008 codifies into statute what had hitherto been common law principles in relation to mental capacity. It defines the lack of mental capacity as:

“... a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain”

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and also that

“It does not matter whether the impairment or disturbance is permanent or temporary.”

DIFFERENT TYPES OF MENTAL CAPACITY

The lack of mental capacity (mental incapacity) may be a permanent, temporary, or fluctuating state.

Permanent mental incapacity occurs when the incapacity is long-term. However, even where this is the case, there have been cases where persons have recovered their mental capacity in part or in full, so periodic reassessments should be conducted to establish whether mental capacity has returned. Permanent incapacity can occur in the following conditions:

- Persistent vegetative state
- Locked-in syndrome
- Advanced Dementia

Temporary mental incapacity occurs when the incapacity lasts for only a short period of time and the person subsequently recovers his mental capacity. Decisions that are non-urgent should be deferred where possible until the person has regained his mental capacity to make those decisions himself. Temporary incapacity can occur in the following conditions:

- Alcohol intoxication or under the influence of illicit psychoactive drugs
- Affected by prescribed medications
- Delirium from medical causes including infections and metabolic disturbances
- Cerebral vascular accidents and head injury without irreversible impairment to cognitive functions

Fluctuating mental capacity occurs when the mental capacity of the person is variable and changes over time. In such situations, the person should be supported to make decisions during the periods when he has mental capacity to make those decisions. Fluctuating incapacity can occur in the following conditions:

- Early-stage dementia
- Clinical depression
- Schizophrenia

POINTS TO TAKE NOTE OF IN THE ASSESSMENT OF MENTAL CAPACITY

The assessment of mental capacity is undertaken to determine the ability of a person to make a specific decision at a particular point in time, i.e., the time that the decision needs to be made. It is not about a person's ability to make decisions in general. In most cases, the person may have the capacity to make some decisions but not others. However, there are cases where the mental impairment may be so severe that the person lacks capacity for a broad range of decisions, e.g., in someone with severe dementia or intellectual disability.

The assessment should be carried out when a person's capacity is in doubt and he has to make a particular decision. This doubt may arise for various reasons, e.g., because of the person's behaviour or circumstances, or because the person was previously diagnosed with an impairment of or disturbance in his mind or brain and lacked the capacity to make some other decision. The person cannot be forced to undergo a formal assessment of mental capacity. It may help to explain to him why it is necessary and what the consequences of refusal would be.

Mental capacity is not static and may change over time, hence periodic review of the person's capacity may be required. It has to be assessed on a case-by-case basis and cannot be assumed based only on the person suffering a particular medical condition, his age, appearance, or behaviours.

The assessment of mental capacity may be informal where it is done to determine the person's capacity to make everyday choices, such as what to eat and wear, and are usually made by a variety of people involved in the care of the person, e.g., their caregivers.

In more specific situations, a formal assessment of mental capacity may be required especially when there is reason to suspect that the person may not have the mental capacity to make important decisions, e.g., major financial decisions like selling property, major healthcare decisions like undergoing surgery, or major social care decisions like moving into a nursing home. It is also required in applications for Lasting Power of Attorney (LPA) when the person still retains mental capacity or in Deputyship applications for a Court-Appointed Deputy when the person already lacks mental capacity to make decisions in many areas of their life.

These formal capacity assessments may be undertaken by registered medical practitioners, e.g., primary care doctors and family physicians. For more complex cases, medical specialists in mental health, such as psychiatrists, may need to carry out the assessments. The assessor may charge a fee for conducting the assessment. To avoid any conflict of interest, the assessor should not be related to the person being assessed or the individual seeking the formal assessment of the person.

The legal standard required in the assessment to prove the lack of mental capacity in someone is based on the civil standard of the balance of probabilities [section 4(4) Mental Capacity Act]. To meet this standard, the assessor must be able to show that it is more likely than not that the person lacks the capacity to make the specific decision.

GENERAL PSYCHIATRIC ASSESSMENT AT A PRIMARY CARE SETTING

The general psychiatric assessment includes a thorough history taking, detailed mental state examination, physical examination, and relevant investigations. Due to the shorter consult time available, the traditional form of psychiatric assessment has to be shortened and adapted for the primary care setting and should focus on the following key areas²:

- Identifying past and screening for the presence of current mental illness
- Establishing and maintaining rapport
- Involving others
- Use of the assessment as therapy and work in progress
- Identifying and managing risk
- Hypothesis formation and a simplified approach to diagnosis

The psychiatric assessment should lead to the identification of any current psychiatric condition that may impact on the person's mental capacity. It is essential to establish what is the baseline for the person in terms of any symptoms and level of functioning before exploring how that has changed over time, as well as determining the current psychological and emotional state of the patient. Developing and maintaining rapport with the patient is crucial for successful assessment. It is essential to obtain corroborative history and to do a risk assessment to determine the current risks.

PSYCHIATRIC ASSESSMENT OF MENTAL CAPACITY

The psychiatric assessment of mental capacity is guided by the principles and standards codified in the Mental Capacity Act.

Two-Stage Test to Determine Mental Incapacity

One of the key principles in mental capacity is that "*A person must be assumed to have capacity unless it is established that the person lacks capacity*" [section 3(2) Mental Capacity Act 2008]. Therefore, the capacity assessment is performed to rebut that assumption and to establish instead that the person in fact lacks mental capacity. However, there must first be sufficient grounds to suspect that the person may lack mental capacity to warrant the capacity assessment in the first place.

The legal definition of “lack of capacity” in the MCA provides for a two-stage test of assessing mental capacity [section 4(1) Mental Capacity Act 2008]:

Step 1 (Diagnostic Test): Is the person suffering from an impairment of or disturbance in the functioning of the mind or brain?

Step 2 (Functional Test): If yes, does the impairment or disturbance cause the person to be unable to make a decision when he needs to?

The assessment should first determine if **Step 1**, often referred to as the diagnostic test, is satisfied, i.e., does the person suffer from a condition that may reasonably be expected to impair his mental capacity. If the answer is no, then there are no grounds to proceed further with the assessment and the basic assumption that the person has mental capacity prevails.

DISORDERS THAT MAY AFFECT MENTAL CAPACITY

Conditions that may cause an “*impairment of, or a disturbance in the functioning of, the mind or brain*” and so result in a lack of mental capacity may include (non-exhaustive list):

- a. **Neurological disorders**, e.g., Cerebral Vascular Accident, Acquired Brain Injury, Delirium, Dementia
- b. **Mental disorders**, e.g., Psychotic disorder (Schizophrenia), Mood disorders (Major Depressive Disorder, Bipolar Affective Disorder)
- c. **Developmental disorders**, e.g., Intellectual Disability

However, it is important not to assume that a person suffering from any of these conditions will necessarily lack mental capacity. To determine if the person lacks mental capacity, the assessment should now proceed with **Step 2** of the two-stage test, often referred to as the functional test.

DETERMINATION OF “UNABLE TO MAKE A DECISION” (I.E., PERSON LACKS MENTAL CAPACITY)

A person is unable to make a decision when he is unable to do one **or** more of the following tasks in relation to making a specific decision at the time it needs to be made [section 5(1) Mental Capacity Act]:

- Understand the information
- Retain the information
- Weigh up the information
- Communicate the decision

All practicable steps must be taken to help the person perform and demonstrate achievement of those tasks in the course of the assessment. The inability to undertake any one of the above tasks is sufficient to render the person as lacking mental capacity for that specific decision.

Understand the Information

The person must be able to understand the information that is relevant to the decision. To help him understand the information, it may be necessary to explain it in a way that is appropriate to his circumstances, such as using simple language, visual aids or by other means [section 5(2) Mental Capacity Act]. The person should not be rushed or pressured but should be given as much time as is needed. He needs to understand information relating to the:

- nature of the decision to be made
- reasons the decision needs to be made
- alternative options available, if there are more than one, regarding the decision to be made
- consequences that can be expected if he chooses each of those options
- consequences if no decision is made

Not being able to understand and appreciate information relating to any of the above aspects of the decision may mean that the person does not sufficiently understand the information. The degree of understanding demonstrated should be proportional to the seriousness of the decision that needs to be taken. Therefore, for high-stakes decisions that carry potentially serious consequences for the person, it would be prudent to set the threshold for meeting this standard of understanding the information higher as compared to lower-stakes decisions with less potentially serious consequences.

Retain the Information

It is sufficient for the person to retain the information for only as long as it is required for him to understand that information, weigh it up in the balance, and communicate his decision.

Weigh Up the Information

The person must be able to demonstrate the ability to weigh the relevant information in the balance and use it to arrive at the decision. For high-stakes decisions with potentially more serious consequences, the person should demonstrate greater rigour in the process of weighing up the relevant information as compared to lower-stakes decisions with less potentially serious consequences.

Communicate the Decision

The person must be able to communicate his decision, and this may be achieved in different ways. All practicable steps should be taken to help the person to communicate effectively, e.g., by the use of interpreters if the person speaks a different language, by sign language if the person has a speech or hearing impairment, by writing, or by some other means. Sometimes it may not be possible for a person to communicate, for example, when a person is unconscious, in a coma, or suffering from locked-in syndrome.

OUTCOME OF THE MENTAL CAPACITY ASSESSMENT

Naturally if the person has been assessed to have mental capacity for the decision that needs to be taken, then their decision must be respected even if others feel that it is an unwise decision. If, however, the person has been assessed to lack mental capacity for a specific decision, the person who needed the decision taken, i.e., the decision-maker, then has to act in the best interests of the person. The decision-maker must take all relevant circumstances into consideration and weigh them up before coming to a decision. The MCA Code of Practice provides a best interest checklist to guide this process.

CONCLUSION

The assessment of mental capacity is carried out to determine if someone has the ability to make specific decisions for themselves. This is important as it allows the patient's autonomy to be respected if they do have the capacity to make the decision, and likewise to afford them the safeguards and protections as they are vulnerable if they lack the capacity to make the decision themselves. The Mental Capacity Act and its accompanying Code of Practice provides the legal framework and guidance for the assessment of mental capacity.

REFERENCES

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LEARNING POINTS

- **Mental capacity is assessed based on the ability of a person to make a specific decision at the time the decision needs to be made.**
 - **Assessment should be carried out when the person's capacity is in doubt and he has to make a particular decision.**
 - **A person is unable to make a decision when he cannot do one or more of these things in relation to making a specific decision at the time it needs to be made: understand the information, retain the information, weigh up the information, and communicate the decision.**
 - **All practicable steps must be taken to help the person make his own decision.**
 - **If the person lacks mental capacity to make a particular decision, the decision-maker must then act in the best interests of the person.**
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